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In The

Supreme Court of the United States

October Term, 1992

NATIONAL ORGANIZATION FOR WOMEN, INC., *et al.*,

Petitioners,

v.

JOSEPH M. SCHEIDLER, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS RANDALL A. TERRY, PROJECT LIFE, AND OPERATION RESCUE IN RESPONSE TO THE BRIEF OF THE UNITED STATES

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INTRODUCTION

The United States, as *amicus curiae*, has asked this Court to decide "[w]hether 18 U.S.C. §§ 1962(c) and (d) require proof of economic motivation either in the racketeering enterprise or in the racketeering acts." For the reasons set forth in their Brief in Opposition, Respondents Terry *et al.* continue to maintain that an economic motive is required under RICO and is not alleged in this case. Moreover, Respondents vigorously contest the Government's position that this is an appropriate case in which to decide the economic motive issue. It is not, for several reasons, not the least of which is that the purported "conflict" in the Circuits on which the Government relies is more apparent than real.

Resolution of the economic motive question is precluded by Petitioners' failure to allege any predicate acts under RICO. Petitioners did not allege extortion because they never claimed that Respondents "obtained" property from them within the meaning of the Hobbs Act, as interpreted by this Court last Term in *Evans v. United States*, 112 S. Ct. 1881 (1992). Further, Petitioners alleged no other predicate acts. Accordingly, Petitioners' RICO claims fail, regardless of how the "economic motive" question posed by the United States might be answered.

I. THIS IS NOT AN APPROPRIATE CASE IN WHICH TO DECIDE WHETHER RICO REQUIRES PROOF OF ECONOMIC MOTIVE

This is an inappropriate case for the Court to determine whether RICO requires proof of economic motive. First, contrary to the representations of the United States (Br. at 5, 6), there is no conflict in the Courts of Appeals on this question. Second, the Government makes no claim that the requirement of pleading and proving economic motive has hindered its ability to enforce RICO. Third, Congress is presently considering specific legislation addressing protest activities at abortion clinics, rendering it unnecessary to determine whether RICO should be extended to encompass such activities.

1. The United States has asked the Court to grant review solely to resolve an alleged conflict in the Courts of Appeals on whether 18 U.S.C. §§ 1962(c) and (d) require proof of economic

motivation either in the racketeering enterprise itself or in the racketeering acts. Three Circuits – the Second, Seventh and Eighth – have held that either the enterprise itself or the predicate acts must have some economic motive.[1] The Government cites the Third Circuit's decision in *Northeast Women's Center, Inc. v. McMonagle*, 868 F.2d 1342 (3d Cir.), *cert. denied*, 493 U.S. 901 (1989), for the contrary proposition, that no economic motive is required either in the enterprise or the predicate acts. Br. at 5, 6. *McMonagle*, however, does not support that proposition. The issue in *McMonagle* was whether extortion under the Hobbs Act requires an economic benefit or motivation. Significantly, the Third Circuit did not even mention the line of cases on which the Government postulates its alleged conflict. The conflict, in fact, is nonexistent. No Circuit has held that RICO does not require proof of economic motive.[2]

2. The Brief of the United States takes issue with the reasoning of the Second Circuit in its decision in *United States v. Ivic*. Br. at 4, 7-11. *Ivic* was decided in 1983. Conspicuous by its absence from the Government's Brief is any claim that either *Ivic* or its progeny has compromised the Justice Department's ability to bring criminal RICO charges in appropriate cases over the past ten

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[1] *See United States v. Ivic*, 700 F.2d 51 (2d Cir. 1983); *United States v. Bagaric*, 706 F.2d 42 (2d Cir.), *cert. denied*, 464 U.S. 840 (1983); *United States v. Ferguson*, 758 F.2d 843 (2d Cir.), *cert. denied*, 474 U.S. 1032 (1985); *NOW v. Scheidler*, 968 F.2d 612 (7th Cir. 1992); *United States v. Anderson*, 626 F.2d 1358 (8th Cir. 1980), *cert. denied*, 450 U.S. 912 (1981); *United States v. Flynn*, 852 F.2d 1045 (8th Cir.), *cert. denied*, 488 U.S. 974 (1988).

[2] Moreover, the district courts that have addressed this issue since the Seventh Circuit ruled in this case have uniformly followed that decision. *See Town of West Hartford v. Operation Rescue*, 792 F. Supp. 161, 168-69 (D. Conn. 1992), *vacated on other grounds*, No. 92-7595 (2d Cir. Apr. 21, 1993); *Webster v. Operation Rescue*, No. 91-C-20138 (N.D. Ill. Oct. 9, 1992) (1992 WL 281366); *Lucero v. Operation Rescue of Birmingham*, No. CV91-PT-1082-S (N.D. Ala. Mar. 2, 1993); *Women's Pavilion, Inc. v. Morality*, No. 3:91CV7250 (N.D. Ohio Dec. 23, 1992). *Cf. Town of Brookline v. Operation Rescue*, 762 F. Supp. 1521, 1523 (D. Mass. 1991) (rejecting RICO claim for lack of injury to plaintiff and lack of Hobbs Act extortion). *But see Feminist Women's Health Center v. Roberts*, No. C86-161 (V)D (W.D. Wash. Mar. 11 and May 3, 1988) (1988 WL 156656), subsequent opinion, No. C86-161Z (W.D. Wash. May 5, 1989) (1989 WL 56017), *appeal pending*, Nos. 90-35266 and 90-35298 (9th Cir. argued Feb. 5, 1992) (*contra*).

years. That alone strongly suggests that there is no pressing need for the Court to decide the economic motive question at this time.

3. Finally, any suggestion that the Government needs a broader reading of RICO in order to deal effectively with abortion protests simply overlooks the other weapons available in the Government's armamentarium. Congress is presently considering legislation that would make it a felony to interfere with access to abortion clinics.[3] And it is already a federal crime to burn or bomb "any building . . . or other real . . . property used in interstate . . . commerce or in any activity affecting interstate . . . commerce." 18 U.S.C. § 844(i). In sum, there is no persuasive reason for the Court to grant review of the RICO question presented.

II. RESOLUTION OF THE ECONOMIC MOTIVE QUESTION IS PRECLUDED BY PETITIONERS' FAILURE TO ALLEGE ANY PREDICATE RACKETEERING ACTS UNDER RICO.

The threshold and dispositive issue in this case, which the Government relegates to the end of its Brief, is whether Petitioners have properly pleaded extortion under the Hobbs Act, the only predicate acts alleged in support of their RICO claims. If, as Respondents contend, they have not, then there is no need for the Court to address the economic motive issue.

A. The Economic Motive Question Cannot Be Considered In Isolation From The Dispositive, Threshold Question Of The Sufficiency Of Petitioners' Extortion Claims.

The United States suggests that the extortion issue is not properly before the Court "because it is not fairly included within the question presented by petitioners." Br. at 15. But the rule to which the Government apparently refers – Supreme Court Rule 21.1(a) – is a limitation on *Petitioners*, not *Respondents*. The prevailing party – respondent or appellee – "may rely upon any

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[3] *See* S. 636, the "Freedom of Access to Clinic Entrances Act of 1993," H.R. 796, the "Freedom of Access to Reproductive Services Act of 1993," 103rd Congress, 1st Sess.

matter appearing in the record in support of the judgment below." *Blum v. Bacon,* 457 U.S. 132, 137 n.5 (1982). This is true "whether or not that ground was relied upon or even considered by the trial court," *Dandridge v. Williams,* 397 U.S. 471, 475 n.6 (1970), or even if "his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." *Id.*

The extortion issue cannot be avoided as it is a " 'predicate to an intelligent resolution' " of the Petitioners' RICO claim. *Cuyler v. Sullivan,* 446 U.S. 335, 342-43 n.6 (1980) (quoting *Vance v. Terrazas,* 444 U.S. 252, 258-59 n.5 (1980)). If no RICO predicate acts were properly pleaded, there is no RICO cause of action and therefore no need to determine whether the enterprise itself or the predicate acts require an economic motive.

B. Petitioners Did Not Allege Extortion Because They Never Claimed That Respondents "Obtained" Property From Them Within The Meaning Of The Hobbs Act.

Petitioners alleged that Respondents "did wrongfully use threatened or actual force, violence or fear to induce or attempt to induce the employees of affected clinics *to give up* their jobs; doctors involved with affected clinics *to give up* their economic right to practice medicine at the plaintiff clinics; patients of affected clinics *to give up* their right to obtain services at the plaintiff clinics; and prospective patients of clinics *to give up* their constitutional right to decide whether and where to obtain medical services free from fear of violence or threatened or actual force." Second Amended Complaint, ¶¶97, 98(d), Resp. Scheidler *et al* Br. Opp. at 24a-25a (emphasis supplied). These allegations fall far short of what is required to plead Hobbs Act violations.

The Hobbs Act defines extortion as:

> the *obtaining* of property *from* another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

18 U.S.C. § 1951(b)(2) (emphasis supplied). It is a fundamental rule of interpretation to begin with the text of the statute. *United States v. Turkette,* 452 U.S. 576, 580 (1981). Words are to be given

their ordinary meaning. *Russello v. United States*, 464 U.S. 16, 21 (1983). The Oxford English Dictionary, vol. 10, 669-70 (2nd ed. 1989), traces the development of the uses of "obtain" through the history of the English language. Its principal sense is "to come into the possession or enjoyment of (something) . . . , to acquire [or] get." *Id.* "Obtaining . . . from" is not synonymous with "part with," which means "to let go, give up [or] surrender." *Id.* vol. 11 at 262.

Just last Term, all nine Justices of this Court agreed that the Hobbs Act is based upon New York law and incorporates the elements of extortion at common law. *See Evans v. United States*, 112 S. Ct. 1881, 1885 (1992). One of those elements is that the defendant must "obtain" property from another; it is not enough to plead and prove that the defendant "deprived" someone of his property. But Petitioners have pleaded only that Respondents "deprived" them of property. They never pleaded that Respondents (or anyone associated with them) "obtained" their property.

The Hobbs Act took its relevant language from the New York Penal Code. *United States v. Enmons*, 410 U.S. 396, 406 n.16 (1973).[4] *See also United States v. Addonizio*, 451 F.2d 49, 72 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) (citing *United States v. Nedley*, 255 F.2d 350, 355-58 (3d Cir. 1958), and following New York law). In *Nedley*, the Third Circuit squarely held, in accord with New York law, that "obtaining" was synonymous with "taking" and that "robbery" in the Hobbs Act did *not* extend to "interference by force and violence with . . . lawful dominion and control," since no "taking" or no "intent to steal" could be shown. 255 F.2d at 354-57. The court observed:

> We cannot subscribe to the proposition that Congress intended by the inclusion of the word "obtain" to scrap centuries-old concepts of the elements of a felony such as robbery and to obliterate requirements of "taking" and "carrying away [or the appropriate state of mind]."

Id. at 356.

Under New York law, it is well-settled that an unlawful taking is required in the law of extortion. *People v. Whaley*, 6 Cow. 661,

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[4] The relevant legislative materials are ably stated and reviewed in *United States v. Mazzei*, 521 F.2d 639, 651-55 (3d Cir.) (Gibbons, J., dissenting), *cert. denied*, 423 U.S. 1014 (1975).

663 (N.Y. 1827) ("[e]xtortion. . . . signifies the taking of money" with corrupt intent) (cited in commentary to Field Code of 1865, § 613 (extortion)). In *People v. Ryan*, 232 N.Y. 234, 235, 133 N.E. 572, 573 (1921), a prosecution for blackmail, in which an intent "to extort" was required, the New York Court of Appeals held that a threat to injure a business without an accompanying intent to "gain money or property" did not fall within the scope of the statute.

Petitioners' allegations of extortion are limited to claims that clinics, doctors or patients were deprived of property (or of the ability to exercise certain rights). But "to deprive" is simply not the same as "to obtain from." Respondents were not business competitors of the clinics or their employees. They stood to gain nothing by the reduction in the clinics' business. No claim was made that Respondents were motivated by a desire to "obtain from" anyone property, tangible or intangible. Even assuming, *arguendo*, that those who were associated with the clinics lost "property" (*but see* Resp. Terry *et al.* Br. Opp. § IV(B)) and that their patients may have been frustrated in the attempt to exercise their "rights", neither the protesters nor anyone associated with them gained that "property" or exercised those "rights". Nor did any third party gain the clinics' property. Thus, the crime of "extortion" simply does not fit the alleged conduct. *See, e.g., People v. Squillante*, 18 Misc. 2d 516, 564, 185 N.Y.S.2d 357, 361 (1959) (" '[o]btaining of property from another' imports not only that he give up something but that the obtainer receive something").[5] Whatever else Respondents might have been, they were not "extortionists."

Far from casting doubt on Respondents' interpretation of extortion, *United States v. Green*, 350 U.S. 415 (1956), cited by the United States, Br. at 15, confirms the distinction which Respondents make but which the Third Circuit in *McMonagle* and the court below overlooked. In *Green*, this Court clearly cited the Hobbs Act definition of extortion, requiring "obtaining," and noted that "[t]he extortions alleged consisted of attempts to obtain . . . . " *Id.* at 417. The issue in *Green* was not the meaning of "extortion"

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[5] The opinion in *Squillante* is entitled to particular weight because, as previously noted, the Hobbs Act was based on New York law. *See United States v. Enmons*, 410 U.S. at 406 n.16.

but whether there was a "labor exception" to the Hobbs Act or whether the Act applied to the employer-employee relationship and unions. *See United States v. Green*, 135 F. Supp. 162, 163 (S.D. Ill. 1955). The Court there identified the appropriate distinction in concluding that "extortion as defined in the statute in no way depends upon having a *direct benefit* conferred on the person who *obtains* the property." *Id.* at 420 (emphasis supplied). Obviously, the lack of necessity for one factor (direct benefit) cannot negate the presence of a different statutory requirement (obtain).[6]

The allegations of "extortion" in the Second Amended Complaint simply disregard the common law requirement of "taking" or "obtaining" incorporated into the Hobbs Act. Essentially, Petitioners' theory of extortion is that any garden-variety political protest aimed at an industry causes extortion to the extent that it adversely influences businesses and consumers. If businesses sell less, if consumers buy less, if fewer employees are employed, that is "extortion" of each of them. The extorter need *obtain* nothing; it is sufficient if the businesses, consumers, or employees are deprived of (or "give up") something. Finally, under this theory, the very nature of protest supplies the element of "actual or threatened force or fear." This theory profoundly contradicts the clear principle of the First Amendment that "[s]peech does not lose its protected character, however, simply because it may embarrass

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[6] The Third Circuit holding in *McMonagle* that no economic benefit or motivation is necessary in pleading and proving a Hobbs Act violation is clearly wrong. None of the decisions it cited supports its holding. *United States v. Cerelli*, 603 F.2d 415 (3d Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980), merely held that the extortionist need not obtain the property himself – a political party may be the recipient of the extorted contributions. *United States v. Starks*, 515 F.2d 112 (3d Cir. 1975), held that a religious purpose does not preclude a finding of extortion where money is taken. Finally, *United States v. Anderson*, 716 F.2d 446 (7th Cir. 1983), dealt not with the "obtaining from" element of extortion, but with the failure to give kidnapping instructions. The record, however, included evidence that defendant had extorted $300 from the victim. Curiously, the Third Circuit failed to cite its own controlling precedent recognizing that extortion under the Hobbs Act was a "larceny-type offense." *United States v. Sweeney*, 262 F.2d 272, 275 (3d Cir. 1959) (citing *United States v. Nedley*, 255 F.2d 350 (3d Cir. 1958)). *McMonagle*, in short, is unpersuasive. The court below referred to *McMonagle's* holding in passing, but without independently addressing this issue.

others and coerce them into action." *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910 (1982). *See also* Resp. Scheidler Br. Opp. at 26 n.15. Petitioners failed to allege any violations of the Hobbs Act.

C. Petitioners Did Not Allege Any Other Predicate Acts And Are Bound By Their Pleadings.

Over the course of several years of litigation and extensive discovery, Petitioners filed four complaints and one RICO case statement. Not one of these pleadings alleged any predicate racketeering activity other than extortion under the Hobbs Act.

Petitioners' Second Amended Complaint contained three RICO counts. The first RICO count, based on 18 U.S.C. § 1962(a), alleged that Respondents had committed "predicate offenses in violation of 18 U.S.C. Section 1951 (the 'Hobbs Act')." Second Amended Complaint, ¶97, Resp. Scheidler Br. Opp. at 24a. The following paragraph listed a series of acts allegedly committed by Respondents or their "co-conspirators," all of which were said to constitute "extortion". Second Amended Complaint, ¶98, Resp. Scheidler Br. Opp. at 25a-28a. The second RICO count, based on 18 U.S.C. § 1962(c), cross-referenced the same alleged acts of extortion pleaded under the first RICO count and referred to Respondents' alleged "violation of 18 U.S.C. Section 1968(c) [*sic*]." Second Amended Complaint, ¶109, Resp. Scheidler Br. Opp. at 30a-31a. The third RICO count, based on 18 U.S.C. § 1962(d), also cross-referenced the earlier paragraphs and alleged that Respondents had "agreed to the commission of extortionate acts." Second Amended Complaint, ¶¶112, 113, Resp. Scheidler Br. Opp. at 31a. No other predicate acts were alleged.

Petitioners also filed a RICO case statement which contained two exhibits listing dozens of alleged incidents at abortion businesses, in which Respondents or their myriad alleged "co-conspirators" were purportedly involved. Although the Government correctly observes that one of these offenses – arson – is a separate predicate offense under RICO, Br. at 16, it erroneously intimates that Petitioners pleaded arson as a separate predicate offense in their RICO case statement. They did not. The only distinct predicate racketeering acts alleged in the RICO case statement were

extortion under the Hobbs Act. RICO case statement at 2-6, 8-10. Indeed, after cross-referencing their exhibits, Petitioners state: "These acts violate the Hobbs Act, 18 U.S.C. § 1951." *Id.* at 5. Later in their RICO case statement Petitioners stated that the *only* racketeering activities alleged were violations of the Hobbs Act: "The predicate acts listed in Exhibits A and B . . . violate the Hobbs Act, 18 U.S.C. § 1951. Hobbs Act violations are in turn deemed racketeering activity under RICO. 18 U.S.C. § 1951." *Id.* at 8.[7]

The only racketeering activity Petitioners pleaded was extortion under the Hobbs Act. The United States appears to suggest that Petitioners should be allowed to replead predicate acts never asserted, citing *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), and *H.J. Inc. v. Northwestern Bell. Tel. Co.*, 492 U.S. 229, 249-50 (1989). Br. at 16. But nothing in either case requires Respondents to be subjected to endless rounds of repleaded complaints while Petitioners vainly search for facts to fit their legal theory. *See Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 528 n.17 (1983).

Petitioners are bound by their RICO case statement. *Marriott Brothers v. Gage*, 911 F.2d 1105, 1108 (5th Cir. 1990); *Guidry v. Bank of LaPlace*, 954 F.2d 278, 283 n.5 (5th Cir. 1992). Failing to allege predicate acts either in any of their complaints or in their RICO case statement, Petitioners' Second Amended Complaint was properly dismissed. *Miranda v. Ponce Federal Bank*, 948 F.2d 41 (1st Cir. 1991); *Glessner v. Kenny*, 952 F.2d 702 (3d Cir. 1991). And dismissal with prejudice was appropriate where Petitioners had repeated opportunities to plead proper predicate offenses, failed to do so and never sought leave to amend to correct deficiencies in their pleadings. *McLaughlin v. Anderson*, 962 F.2d 187, 195 (2d Cir. 1992).

Since Petitioners did not properly plead any predicate acts, this case presents no occasion for the Court to consider the question addressed by the United States, *i.e.*, whether RICO

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[7] Petitioners never claimed in the District Court, the Seventh Circuit or this Court that they pleaded any predicate racketeering acts other than extortion under the Hobbs Act. *See e.g.*, Pet. Rep. Br. at 2 n.2 (citing par. 98(a)-(1) of the Second Amended Complaint as "detail[ing] some of the acts of extortion").

requires proof of economic motivation either in the racketeering enterprise or in the racketeering acts. Accordingly, the petition for *certiorari* should be denied.

CONCLUSION

The petitioner for a writ of *certiorari* should be denied.

Respectfully submitted,

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